



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 192 OF 2000

IRENE ADHIAMBO t/a WABURA INVESTMENTS APPELLANT

VERSUS

THE AUCTIONEERS LICENCING BOARD RESPONDENT

J U D G E M E N T

This is an appeal which arose from a disciplinary case No. 45 of 2000 at the Auctioneers Licensing Board in which an advocates firm known as Odenyo & Company complained that the appellant had held herself out as an auctioneer, when she was not, executed warrants of attachment and received proceeds thereof which she did not release to the decree holder.

The Board meeting was convened on 21st March 2000 wherein the complainant and the appellant were heard and the appellant was found guilty on 2 (two counts), namely failing to account for Kshs.30,000/= received on behalf of the decree holders advocate and purporting to execute a warrant of attachment addressed to her).

It then went ahead to order the revocation of the appellant's licence and also ordered her to refund the sum of Kshs.30,000/= to the decree holder's advocate within 30 days. This decision did not find favour with the appellant who filed an appeal to this court on 20th April, 2000 in a memorandum of appeal which listed 5 grounds of appeal.

These grounds were that the tribunal erred in finding that the appellant had failed to account for Kshs.30,000/= in the absence of any evidence, that it erred in entertaining a complaint from an advocate who was not on record in the subject matter and who had not tendered any evidence of instructions from the principal client, that it erred in finding that the appellant had executed warrants not addressed to her in absence of any supporting evidence; that the board erred in failing to find that in fact the warrants in issue were executed by the auctioneers to whom they were addressed and not the appellant and that it erred in law and fact in revoking the appellant's licence.

The appeal was called to hearing in this court on 23rd October, 2002 wherein counsel for both parties appeared to submit either in favour of or against the same.

Counsel for the appellant referred to the affidavit of the appellant sworn on 20th April, 2000 in support of an application for stay in which it was shown that the warrants were addressed to the licenced auctioneer of Wabura Investments Mr. Charles Khamala.

That it was after this that the appellant was issued with a class A auctioneers licence which did not entitle her to execute court warrants.

That the appellant explained in the affidavit her position in Wambura Investments and said she was only an administrator or Marketing Executive therein.

That it was not the appellant supposed to account for Kshs.30,000/= but the person who had actually executed the warrants.

According to counsel, if the appellant posed as an auctioneer and was dealt with as such by the advocate, then the sentence of the tribunal in revoking her licence was harsh and that a fine or suspension would have sufficed.

Counsel for the respondent opposed the appeal and referred to the affidavit sworn by the Chairman of the board and said the appellant held herself to the complainant as an auctioneer and this is why he addressed all correspondence relating to this matter to her directly.

That it was later that the complainant discovered that it was one Khamala in charge of Wabura Investments. That the appellant was given an opportunity to defend herself and that the affidavit which was filed by her later contradicts what she told the board.

According to counsel, the appellant had received the warrants before obtaining the auctioneer's licence.

That she also received Kshs.30,000/= and that the board arrived at a proper decision that the appellant held herself out as an auctioneer when she was not.

He prayed that this appeal be dismissed with costs.

The evidence considered by the board was that of the complainant and that of the appellant.

The complainant himself is an advocate of the High Court of Kenya who would be expected to have known from notices issued by court from time to time who authorized court brokers and auctioneers are and not rely on officers employed in such offices.

This advocate said before the board

“We gave Irene the warrants all which were released to her in her trade name”.

If this is what is on record and marked as “IA4” then this statement by the complainant was a misrepresentation because the warrants of attachment were issued in the name of C.A Khamala, court Broker, t/a Wabura Investment.

The complainant continued

“She wrote to former counsel on record saying she had received Kshs.30,000/= from the judgement - debtor. She wrote saying that she could not get any other attachable properties of the judgement -debtor”.

I perused copy of the letter on record and saw that it was drafted on the headed letter of Wabura Investment and addressed in verb “we”.

And even the letters addressed to the attention of the appellant in this matter by the complainant were so addressed to Wabura Investments and not to the appellant in person.

And when the appellant testified she said how she got the warrants.

“We proclaimed.

When we went for attachment the judgment-debtor gave us Kshs.30,000/= we agreed to that.

She testified as to how one Khamala refused to release the Kshs.30,000/=. She said Khamala was there.

This is the C.A Khamala in whose name the warrants were delivered.

What she was inviting the board to do was to find out from Khamala why he had refused to release Kshs.30,000/= to counsel for the decree holder.

She even hinted to the board.

“We were holding Ksh s.30,000/= as part of our charges”

. With this kind of revelation, it was incumbent upon the board to call the Khamala and make further investigations as to what the dispute before it was all about other than jump to the conclusion that certain offences had been disclosed against the appellant.

Auctioneers firms, just like advocates firms, employ workers and if an advocate of the complainants' calibre in this appeal dealt with somebody (the appellant) in Wabura Investments without confirming from the usual records at the court in what capacity she was dealing therein, an note, it is clerks who deal with administrative matters in such offices, then he was equally to blame and should not have been heard to complain that the appellant held herself out to him as an auctioneer.

And as the principal in Wabura Investments was named in the evidence at the board, and without calling the judgement debtor to say who actually came to execute the warrants or to whom he paid the Kshs.30,000/= as a result of this execution, the charges of the appellant executing the warrant of attachment or her failing to account for Kshs.30,000/= received on behalf of the decree holder's advocate, could not lie.

This appeal is allowed, the order of the board dated 21st March, 2000 set aside and her auctioneers licence class A reinstated to her. Each party to bear her/its own costs of the appeal.

Delivered this 30th day of October, 2002.

D.K.S AGANYANYA

JUDGE